No. 43358-3-II
(Consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERRO DAGRACA,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Judges John McCarthy (motion), Katherine Stolz (motions) and Ronald E. Culpepper (trial)

OPENING BRIEF OF APPELLANT DAGRACA

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. The convictions must be reversed and dismissed because appellant Jerro DaGraca was a juvenile when the crimes were committed and the "automatic decline" provision applied against him is unconstitutional under the Eighth Amendment against "cruel and unusual" punishment, as well as due process protections. Caselaw holding to the contrary is no longer good law.

2. There was insufficient evidence to prove the conviction for kidnaping because the relevant restraint was incidental to the robbery.

3. The trial court erred in finding that the robbery was "complete" when the wallet was taken and in concluding that there was a different criminal intent for the restraint and the robbery offenses.

4. The sentencing court erred in failing to find that the kidnaping was the "same criminal conduct" as the robbery.

5. Pursuant to RAP 10.1(g), DaGraca adopts and incorporates the arguments presented by codefendant Corey Young in his opening brief on appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant DaGraca was 17 years old when the crimes occurred, but was tried automatically as an adult under the "automatic decline" provisions of the Juvenile Justice Act.

   In In re Boot, 130 Wn.2d 553, 925 P.2d 560 (1996), the Supreme Court upheld the automatic decline statute as constitutional. Since that time, however, the underpinnings for the holding in Boot have all been eroded and several cases upon which Boot relied overturned.

   Is reversal and dismissal of the charges required because the automatic decline statute violates the Eighth Amendment and due process and the holdings to the contrary in Boot are no longer good law?

2. The victim was approached at his car by the two defendants who held him at gunpoint, demanded money, searched him for money and then had him drive to a nearby store to try to get money from what they thought was a credit card he had in his pocket.

Was the evidence insufficient to support a separate conviction for kidnaping where the purpose and intent in moving the victim was to facilitate and continue the ongoing robbery?

Washington recognizes the "transactional" view of robbery, treating it as a continuing offense. Did the court err in finding that the robbery was "complete" when the victim gave the cash he had to the defendants even though the incident continued and further "taking" occurred for the next 20-30 minutes?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jerro De Jon DaGraca was charged by information with one count of first-degree robbery with a firearm enhancement and one count of first-degree kidnaping, also with a firearm enhancement allegation. CP 1-2; RCW 9.41.010; RCW 9.94A.530; RCW 9.94A.533; RCW 9A.56.190, RCW 9A.56.200(a)(i)(ii). Motion and continuance hearings were held before the Honorable Judges Katherine Stolz and John McCarthy on January 9, February 23, 27 and 28 (McCarthy), March 8, 15, 20 and 26, 2012, after which a jury trial was held before the Honorable Judge Ronald E. Culpepper on March 27-28, 2012.[1] DaGraca was found guilty of the first-degree robbery and first-degree kidnaping charges but not of being armed with a firearm for each offense. CP 55-58.

On April 23, 2012, Judge Cuthbertson ordered DaGraca to serve a standard-range sentence. CP 111-23. This appeal timely follows. See CP

[1]The verbatim report of proceedings consists of four volumes, which will be referred to as follows:

the volume containing the proceedings of January 9, February 23 and 27, March 8, 15, 20 and 26, 2012, as "1RP;"
the proceedings of February 28, 2012, as "2RP;"
the trial proceedings of March 27-28, as "RP;"
the sentencing on April 23, 2012, as "SRP."

126.

2. Testimony at trial

It was about 1:30 a.m. on November 19, 2011, and Moua Yang was sitting in his car in the parking lot of his apartment when he saw two people jump over a nearby fence. RP 110-12. Both were male and they came towards Yang's car. RP 114. Yang opened his car door, thinking the men were going to ask him for directions despite the hour. RP 114. According to Yang, one of the men then pointed a gun at Yang and told him to give them all his money and "anything you got." RP 115.

Yang testified that he gave the man with the gun $117 in cash from his pocket, although Yang also said he told the men he had no money at all. RP 115-16. The second man, without a gun, suggested that the man with the gun search Yang's pockets for credit cards. RP 116-17. Both men then searched Yang and the search turned up Yang's I.D. and an "EBT" card which looks like a credit card but is actually a "food stamp" card. RP 118. The men started discussing the card, saying they thought the card must have money and demanding the "PIN" number. RP 117-18. Yang made up a number and the man with the gun appeared to type the number into his phone, after which that man said something like, "[y]ou're lying" and "[i]t's not working." RP 119.

Yang testified that, at that point, the second guy said, "[t]his guy is really scared," after which one of the men hit Yang in the stomach and face. RP 119. Yang told the men they did not "have to do that" because he would give them all the money he had. RP 119. The guy with the gun then said, "[l]et's go to 7-Eleven to get food and money. If you don't get

money for us, you're dead." RP 119.

The men pulled Yang back into his car, where the one with the gun kept it trained on Yang, having Yang drive. RP 119-21. Just a few minutes later, at about 1:55 a.m., Yang arrived at a "7-Eleven" convenience store. RP 19, 54, 121. According to Yang, on the way the men were talking about what they were going to do when they got the money, which he said was "they're going to kill me and put me in the lake so they can have the car and do whatever party they want to do." RP 121.

Once they arrived at the 7-Eleven, however, Yang saw there were a number of police cars there. RP 121. It turned out that six police officers who had gone to the 7-11 to respond to an unrelated call were still there. RP 18, 122. Yang said the man with the gun told him to drive on but Yang drove into the parking lot instead, driving up to the officers very quickly and then stopping right next to them. RP 19, 122. He was going so fast an officer thought Yang would hit them with the car. RP 19-20.

An officer testified that, after stopping the car, Yang rolled down his window and yelled that the two men in the car with him were robbing him and had guns. RP 19-20. Yang himself testified that he actually got out of the car, starting to holler that he needed help, that the men had a weapon and that they were "trying to kill" him for money. RP 122. At that point, the two men got out of the car and took off running. RP 20.

Four officers gave chase. RP 22. One officer admitted that he lost sight of the men. RP 23. He also said he could tell basically that they were African-Americans, medium build, "somewhat tall," and that he could not see their faces. RP 23. He said they were wearing baggy

clothing and he mostly saw their backs. RP 23. Another officer said he saw one man who ran with a Redskins jacket on and a hat but that, after they had been chasing him for awhile, he lost or dropped that coat. RP 105, 106. Yang later identified the jacket as like one the person with the gun had that night. RP 108.

Another officer who had received a call to respond drove into the nearby Towne Center shopping area and saw a black male running through the parking lot towards a pet store. RP 57. The officer said the lot was pretty empty and the person he saw was wearing all dark clothing. RP 57. The officer lost sight of the person for a few seconds and the officer then saw a black male standing by the front entry doors of PetSmart. RP 56. That person appeared to be sweating and breathing heavily, so the officer assumed this was the man for whom he was looking. RP 58. The officer approached at gunpoint and that man was later identified as Jerro DaGraca, then 17 years old, with a birthdate of 12/12/93. RP 61. There were no weapons or anything similar found on DaGraca. RP 64-65.

The officers brought the people they had secured back to the 7-11 area and one officer said that Corey Young told DaGraca, "I got this, Cuz." RP 108.

An officer who talked to Yang and took his statement said Yang seemed "shaky" and scared. RP 28. Yang never told the officer that Yang was inside the car talking on the phone when he saw the men jump over the fence. RP 48-49.

Jerro DaGraca was 17 at the time of the incident and was out with his friend, Corey Young, that night, trying to get someone to buy them

alcohol because they were under age. RP 146. They walked to a nearby place called the "Day and Night Grocery" but were unsuccessful there, so they decided to take a shortcut home, hopping a fence to do so. RP 147. When they saw Yang in his car, he was sitting with his door open, on the phone. RP 147.

DaGraca said they decided to approach Yang and, when they did so, DaGraca asked if Yang would buy them some alcohol. RP 148. DaGraca was slightly familiar with Yang, who lived in the neighborhood. RP 148. Yang responded by holding his finger up to signal "[h]old on," indicating that he was still on the phone. RP 148. After a moment, DaGraca again asked if Yang would buy them some alcohol and Yang responded that he would, so they all drove over to the 7-11. RP 149. When they got there, DaGraca saw police but was not alarmed because he figured that Yang buying them alcohol "wasn't a big infraction." RP 149.

DaGraca was surprised when Yang seemed almost to hit the officers and then suddenly rolled down the window and claimed he was being robbed. RP 149. Dagraca explained that he got out of the car and ran because Young ran and also because Dagraca still had some marijuana from what he had been smoking earlier that night. RP 150-51.

Young testified that they had tried several people at the "Day and Night" but no one would buy alcohol for them, so they decided to "give up and go home." RP 162. It was on the way home, after they had "hopped the fence," that they saw Yang and decided to see if he would buy alcohol for them. RP 163. Young said that, when they pulled into the store lot and saw the officers, Yang "started tripping," asking if they were in any

kind of trouble. RP 165. Young admitted to Yang that "maybe" Young had "some warrants," and also that Young had drugs in his pocket. RP 165. Young explained that he ran because of the drugs and that he did not know anything about .22 caliber round being in the pocket of his jacket. RP 167.

D. ARGUMENT

1. DAGRACA'S CONVICTIONS MUST BE REVERSED AND DISMISSED BECAUSE THE AUTOMATIC DECLINE STATUTE IS UNCONSTITUTIONAL

At the time the crime was committed, DaGraca was a juvenile. See RP 144; CP 1-2. Because of the nature of the offenses, he was subjected to "automatic decline" under RCW 13.04.030(1)(e)(v)(A). Under that statute, the adult court has exclusive original jurisdiction over juveniles who are 16 or 17 when they commit certain crimes, including first-degree robbery and first-degree kidnaping. See RCW 14.05.030(1)(e)(v)(A); see State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007).

The "automatic decline" provisions were first established in 1994. See Boot, supra. In Boot, the Supreme Court declared the general purpose of the statutory scheme and its scope:

> The Legislature here clearly determined to increase the punishment for youthful offenders for the most serious violent crimes by statutorily expanding the jurisdiction of the adult criminal court over 16- and 17-year-olds who commit such crimes without a hearing in juvenile court under RCW 13.40.110.

130 Wn.2d at 563. When the statute applies, the Court has no "latitude to vest jurisdiction" anywhere other than with adult court, regardless of the facts of the case. Id.

In Boot, the Supreme Court upheld the then-current version of the

"automatic decline" statute against multiple constitutional challenges, including both the Eighth Amendment and due process. 130 Wn.2d at 565-66. But the holding of Boot is no longer good law, as even brief examination of recent caselaw makes clear.

First, regarding the Eighth Amendment, the Boot Court held that there was no violation of that provision by subjecting a juvenile to adult court jurisdiction - and adult-level punishment - even without any judicial consideration of the specific facts of the case. Although recognizing that there was a perception that "the adult criminal court is capable of assessing much longer sentences" than juvenile court, the Boot Court dismissed that perception, noting that even sending a 13-year old to prison for life without the possibility of parole had been upheld against an Eighth Amendment challenge. Boot, 130 Wn.2d at 570, citing, State v. Massey, 60 Wn. App. 131, 803 P.2d 340, review denied, 115 Wn.2d 1021, cert. denied, 499 U.S. 960 (1991).

In Massey, the Court specifically rejected the idea that it should consider the fact that the defendant was 13 years old when deciding whether the punishment imposed was "cruel and unusual." 60 Wn. App. at 146. Put simply, the Court found, the analysis used to decide whether something was cruel and unusual "does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed." 60 Wn. App. at 146. The Massey Court did not believe that there was "cause to create a distinction between a juvenile and an adult who are sentenced to life without parole" for the same offense. Id. Based upon this reasoning, the Court upheld the sentence of life

without the possibility of parole for a 13-year old, without considering any factors relating to the age or developmental level of that child. Id.

But the analysis used in Massey and relied on in Boot is no longer good law. Beginning in 2005, the U.S. Supreme Court has issued several opinions recognizing the very real differences between juveniles and adults, including that juveniles have a "lack of maturity and an underdeveloped sense of responsibility," have a higher susceptibility to outside pressure such as peer pressure and other "negative inferences," and that the juvenile's "character" is more transitory and less fixed than adults. See Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

As a result of these new understandings, the Court has reversed itself - and the underpinnings of Boot - in significant ways. In Roper, the Court reversed its previous holding that a sentence of death for a crime committed when the defendant was 16 or 17 was not cruel and unusual punishment. 543 U.S. at 569-70. A plurality of the Court had upheld that sentence years before, in Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989). But the Roper Court noted that Stanford failed to honor the concept of proportionality. Roper, 543 U.S. at 574-75. Further, the Roper Court noted, since the decision in Stanford, the understanding of the mental and emotional development of juveniles had changed, so that the Court now recognized that "juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 569-70. Put simply, the irresponsibility of a juvenile is not as "morally reprehensible" as the same acts in an adult, because the failings of the

minor might be simply transitory immaturity and could well be reformed, as opposed to the adult. Id. Further, although juveniles can commit heinous crimes, the Roper Court noted, because of the serious differences in maturity, impulse control and other factors, juveniles should not be treated the same as adults. Id. Ultimately, the Court held, imposition of the death penalty on someone who committed even a heinous crime at ages 16 or 17 was "disproportionate punishment," and violated the 8th Amendment. Id.

A few years later, the Court expanded on its holding in Roper and its understanding of the differences between juveniles and adults, in Graham v. Florida, ___ U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011). In that case, the Court held that it was a violation of the 8th amendment prohibitions to sentence a juvenile to life without the possibility of parole for any crimes other than homicide. 130 S. Ct. at 2021-22. Again the Court was concerned with evidence that there was a significant difference between juveniles in adults, especially in "brain functioning" and lack of maturity. 130 S. Ct. at 2026. Quoting Roper, the Court noted the brain, behavior and impulse control issues of juveniles, noting that they were more "capable of change than are adults," so that the actions of a juvenile "are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." 130 S. Ct. at 2026. Further, the Court noted, compared to "an adult murderer," a juvenile offender who did not kill or intend to kill had less "moral culpability" in the same situation. Id. Thus, the Graham Court concluded, contrary to the holding in this state in Massey, "[t]he age of the offender and the nature of

the crime each bear" on 8th Amendment analysis. Graham, 130 S. Ct. at 2026.

In addition, for the first time, the Court compared a death sentence to the sentence of life without the possibility of parole, finding that the two sentences "share some characteristics. . .that are shared by no other sentences." 130 S. Ct. at 2027. Although the offender sentenced to "life" is not put to death, the Court noted, a sentence of life without the possibility of parole is an irrevocable, permanent loss; a "denial of hope" because regardless of any efforts at rehabilitation, there will be no release. Id. Further, the Court found, a "life without" sentence is "especially harsh" for juveniles, because the juvenile "will on average serve more years and a greater percentage of his life in prison than an adult offender." Id.

The Court concluded that, while a juvenile is "not absolved of responsibility for his actions," his "transgression is not as morally reprehensible as that of an adult" and the life without parole sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity." Graham, 130 S.Ct. at 2029-30. Given the "limited culpability of juvenile nonhomicide offenders" and the severity of the penalty, the Court held, it was required to draw a "clear line," prohibiting all such sentences in non-homicide juvenile cases in order to prevent the possibility that "life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." Id. The Court concluded that, while "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of

a nonhomicide crime," it is required to give such offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

Ultimately, the Court held, "[a]n offender's age **is relevant** to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham, 130 S. Ct. at 2031 (emphasis added).

Here, of course, the "automatic decline statute" contains just such a failure, relegating all children from 16+ to adult court based solely upon the nature of the crime without any recognition of the development, maturity and culpability issues identified in Roper and Graham.

More recently, in Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court held that the 8th Amendment was violated by any sentence of life without the possibility of parole imposed on a juvenile for even a homicide if that sentence is not imposed after full consideration of the mitigation of youth. Mandatory sentences such as life without the possibility of parole run afoul of the 8th Amendment when imposed on a juvenile, the Court held, because the court is not allowed to take into account the youth of the juvenile, his immaturity, and other factors relevant to culpability which are affected by age. 132 S. Ct. at 2468-69. Although the Court did not foreclose the possibility that a sentencing authority might decide to impose a "life without" sentence after consideration of the relevant facts, the Court required a specific analysis first: "we require it to take into account how children are different, and

how those differences counsel against irrevocably sentencing them" under mandatory "life without the possibility of parole" provisions. What might be permissible for an adult is not necessarily permissible when the defendant is a juvenile, the Court noted. Id.

Indeed, the Miller Court specifically declared that Roper and Graham "establish that children are constitutionally different from adults for sentencing purposes," because of what we know about their emotional and mental development, susceptibility to outside pressure and other factors. Miller, 132 S. Ct. at 2458.

All of these cases undercut or eliminate the bases upon which Boot was decided. For example, the holding of Boot that the automatic decline statute did not violate the Eighth Amendment was based upon the belief that the defendant's age was irrelevant to Eighth Amendment analysis - a holding set completely aside by Graham and Miller.

Further, the automatic decline statute simply fails to consider any of the relevant issues regarding the age of the offender, simply treating all youths of a particular age as adults without any consideration of the unique developmental and maturity issues that should apply.

In addition, the holding of Boot regarding due process has been cast into doubt. In Boot, the defendant argued that his substantive due process rights were violated by automatic decline because he had a "substantive constitutional right to punishment in accordance with one's culpability, which in turn, depends, in part, on one's ability to make reasoned adult judgments about the consequences of one's acts." 130 Wn.2d at 571. In rejecting that argument, the court in Boot relied on the

fact that there was no Eighth Amendment violation found in Stanford, supra, for imposing the death penalty on kids who committed crimes at ages 16 or 17. Boot, 130 Wn.2d at 571. And again, although the Boot recognized that the U.S. Supreme Court had declared that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," the Boot Court concluded that this holding did not apply to any case which did not involve the death penalty. Boot, 130 Wn.2d at 572. Put simply, the Boot Court concluded that "trial in adult court does not violate the substantive due process rights" of defendants because 16 and 17 year old "violent offenders can be tried as adults in noncapital cases without a prior determination of their ability to make judgments about the consequences of their acts." 130 Wn.2d at 572.

But again, these holdings are no longer good law. Stanford was overruled by Graham precisely because it failed to consider proportionality and the youth of the offenders. And all of the recent U.S. Supreme Court caselaw establishes that juveniles are *not* to be treated as "little adults" but instead are to be dealt with in light of our understanding of the limits of their maturity and culpability. The "automatic decline" statute in this state fails to take into account *any* factors relevant to those issues. As such, the statute is no longer good law, and this Court should so hold and should reverse and dismiss with prejudice.

2. THE CONVICTION FOR KIDNAPING AND THE SENTENCE MUST BE REVERSED BECAUSE THE RESTRAINT USED WAS INCIDENTAL TO THE ROBBERY

Even if Boot were somehow still good law, reversal and dismissal

of the kidnaping conviction and for resentencing would be required, because the restraint used was incidental to the robbery and thus did not support a separate conviction for kidnaping. Pursuant to RAP 10.1(g), DaGraca hereby adopts and incorporates the arguments made on this issue in codefendant Young's brief. In addition, DaGraca submits the following:

Many crimes involve some degree of "restraint." See State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979), cert. denied, 466 U.S. 948 (1980). In addition, the statutes defining "restraint" crimes such as kidnaping are general "broadly worded," so that they may seem to encompass any restraint, even one which is incidental to the commission of another charged crime. See Johnson, 92 Wn.2d at 676; State v. Green, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980).

As a result, in this state, our Supreme Court has held that a separate conviction for a "restraint" crime cannot be upheld on appeal if that restraint was merely "incidental" to the commission of another crime. Green, 94 Wn.2d at 226-27. As the Court declared, "mere incidental restraint and movement of the victim during the course of another crime" will be insufficient to support a separate conviction for a restraint crime. In re Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). This Court has similarly held that, if restraint and movement of a victim are "integral to the commission of another crime," that restraint and movement are not an "independent, separate crime" of restraint and any conviction for a restraint crime must be dismissed. See State v. Korum, 120 Wn. App. 686, 703-704, 86 P.3d 166 (2004), affirmed

in part and reversed in part on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2007).

These holdings reflect the very real constitutional concerns which arise when there is a conviction for both a restraint crime and a separate crime involving that same restraint. Both the prohibitions against double jeopardy and the rights to be free from conviction upon less than sufficient evidence are involved. See Brett, 126 Wn.2d at 174 ("whether the kidnaping will merge into a separate crime to avoid double jeopardy"); Green, 94 Wn.2d at 226-27 (issue addressed under due process, sufficiency analysis).

Thus, where a defendant grabbed the victim, picked her up, carried her 50-60 feet to move her behind a building and then killed her, the restraint of grabbing and moving and secreting her did not support a separate kidnaping conviction because the restraint and movement of the victim was "incidental" to the homicide, i.e., part and parcel of its commission. Green, 94 Wn.2d at 226-27. Similarly, the restraint was incidental to rape charges when a defendant took girls into separate rooms in his home, bound them, raped them, left to buy cigarettes, returned, then took one of the girls out of the home to a wooded area where he raped her again. Johnson, 92 Wn.2d at 672-73. The restraint was "incidental" because the crimes occurred at almost the same time and place and the sole purpose of the restraint was to facilitate the rapes. Id.

Here, the restraint was also "incidental" to the commission of the robbery, because the sole purpose of restraining Tang and having him drive to the nearby store was to effectuate the ongoing robbery over the 20

or 30 minutes it lasted. Not only the jury instructions but the law makes this clear. Jury instruction 15, the "to convict" instruction for Mr. DaGraca on the kidnaping offense specifically told jurors that they had to find "three elements" beyond a reasonable doubt, as follows:

> (1) That on or about the 19th day of November, 2011, the defendant or an accomplice intentionally abducted Moua Yang,
>
> (2) That the defendant or an accomplice abducted that person with intent to facilitate the commission of robbery or flight thereafter, and
>
> (3) That any of these acts occurred in the State of Washington.

CP 79.

Thus, the plain language of the jury instruction established that, in this case, the purpose of the restraint and the intent behind it was, in fact, "to facilitate the commission of robbery or flight thereafter."

Indeed, if the jury had not found that the restraint of Yang was for the purposes of committing the robbery, under the jury instruction the jury would have been required to acquit DaGraca of the kidnaping offense.

Further, Washington law has specifically rejected the "complete upon taking" view of robbery the trial court used here. See State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). Instead of applying that common law view, in this state a "transactional view" is used, so that "robbery can be considered an ongoing offense." Id. As a result, courts have held, for example, that even after someone has taken an item *without* threat or use of force, a robbery conviction which requires proof of such threat or use can be supported by evidence that the defendant used force *after* the taking was complete, if the force is used to escape or prevent the

victim from regaining his property. Id.; see also, State v. Manchester, 57 Wn. App. 765, 790 P.2d 217, review denied, 116 Wn.2d 1019 (1990) (upholding a robbery conviction when the use of force did not occur "until after the taking is legally complete").

Here, the "taking" was ongoing, starting with the cash in Yang's pockets and then, when the QWEST card was revealed, including an effort to take the money from that card as well. During the commission of the robbery, Yang was certainly restrained and moved to a place where the card could be used and the robbery made complete. But again, the purpose of that movement was not a separate harm but instead to facilitate the robbery of Yang which had started a few moments before. The separate conviction for kidnaping therefore cannot stand, and the trial court further erred in failing to find that the kidnaping and robbery were the "same criminal conduct," as argued herein and in codefendant's opening brief on appeal. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the convictions, gained in adult court after application of an unconstitutional "automatic decline" stature. Further, there was insufficient evidence to prove kidnaping as a separate, independent crime, and the kidnaping and robbery should have been found to be the "same criminal conduct." This Court should so hold.

DATED this 12th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and counsel for codefendant, Ms. Sheri Arnold, via this Court's efiling upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Jerro DaGraca, DOC 357576, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 12th day of December, 2012.

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